Supreme Court, U.S.
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No. _____

In The
Supreme Court of the United States
October Term, 1997

Everett Hadix, et al.,
Petitioners.

v.

Kenneth McGinnis, et al.,
Respondents.

United States of America,
Intervenor-Respondent.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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47pp

QUESTIONS PRESENTED FOR REVIEW

I. **Whether the termination provision of the Prison Litigation Reform act (hereinafter PLRA), 18 U.S.C. § 3626(b), violates the constitutional requirement of separation of powers by attempting to set aside a final judgment of an Article III court.**

II. **Whether the termination provision of the PLRA violates separation of powers principles, even as applied to a final judgment granting prospective injunctive relief, when the judgment is founded on a constitutional rather than statutory cause of action.**

III. **Whether the termination provision of the PLRA violates separation of powers principles by stripping federal courts of their inherent equitable power and duty to provide effective remedies in constitutional cases.**

IV. **Whether the termination provision of the PLRA violates separation of powers principles by prescribing a rule of decision.**

V. **Whether the termination provision of the PRLA denies due process by depriving plaintiffs of their protected interest in the judgment.**

PARTIES TO THE PROCEEDING

Petitioners, Everett Hadix, Richard Mapes, Patrick C. Sommerville, Roosevelt Hudson, Jr., Brent E. Koster, Lee A. McDonald, Darryl Sturges, Robert Flemster, Wiliam Lovett, James Covington, James Haddix, and several John Does, are persons who are or were confined in Michigan Department of Corrections (MDOC).

Respondent, Kenneth L. McGinnis is Director of the MDOC; Respondent, Dan Bolden is Deputy Director for the Bureau of Correctional Facilities; Respondent, Denise Quarrels is the Regional Administrator. Respondents, Thomas G. Phillips; Bruce Curtis; Henry Grayson; and Barry McLeMore are Wardens at the SPSM facilities; Respondents, Travis Jones; Harold White; David Jamrod; and Carmen Palmer are Deputy Wardens at the SPSM facilities. Respondents, David Laurin; Fred Parker; Marilyn Ruben; and Mike Rankin are Business Managers. Respondent, Marjorie VanOchten is Administrator for Office of Policy and Hearings.[1]

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[1] These respondents are the successors in office to Perry Johnson, Robert Brown, Graham Allen, Dale Foltz, Elton Scott, Pam Withrow, Frank Elo, John Jabe, Charles Utess and John Prelesnik, and are automatically substituted for them pursuant to Sup. Ct. R. 35.3.

A number of these positions have been expanded from one person to four people as the prison has been divided and each has been assigned its own staff hierarchy.

Respondent Marjorie VanOchten's previous title was Hearings Administrator.

TABLE OF CONTENTS

PAGE

QUESTIONS PRESENTED i

PARTIES TO THE PROCEEDING ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES v

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED 2

STATEMENT OF THE CASE 3

REASONS FOR GRANTING THE WRIT 5

ARGUMENT 7

I. THE PRISON LITIGATION REFORM ACT'S TERMINATION PROVISION VIOLATES ARTICLE III OF THE CONSTITUTION AND THE SEPARATION OF POWERS DOCTRINE 7

A. Introduction 7

B. The Hadix Consent Judgment Represents a Final Judgment of an Article III Court Which May Not Be Reopened by an Act of Congress Via the PLRA 9

C. The Retroactive Application of PLRA Violates Separation Of Powers For The Reasons Enunciated In Plaut 13

D. The "Wheeling Bridge II" Exception to Separation of Powers Principle Does Not Apply Here 16

E. Defendants' Attempt to Distinguish The Consent Judgment Because of "Prospective Relief" Must Fail 19

F. The Termination Provision Unconstitutionally Prescribes Rules Of Decision 21

II. DUE PROCESS AND THE VESTED RIGHTS DOCTRINE 24

III. THE CONFLICT AMONG THE CIRCUIT COURTS OF APPEAL CONCERNING THE IMMEDIATE TERMINATION PROVISIONS OF THE PLRA SHOULD BE RESOLVED BY THIS COURT 26

CONCLUSION 30

APPENDIX A1-A37

Hadix v. Johnson, Nos. 96-2463/2582, 1998 WL 71501 (6th Cir. Jan 13, 1998) (decision of the United States Court of Appeals) 1-6

Hadix v. Johnson, 947 F. Supp. 1100 (E.D. Mich. 1996)(Order of the United States District Court for the Eastern District of Michigan . 7-37

TABLE OF AUTHORITIES

CASES

Alberti v. Klevenhagen, 46 F.3d 1347
(5th Cir. 1995) 10

Benjamin v. Jacobson, 124 F.3d 162
(2d Cir. 1997), reh'g granted en banc
(2d Cir. Dec. 23, 1997) 27,28

Board of Education of Oklahoma City Public
Schools v. Dowell, 498 U.S. 237 (1991) 12,29

City of Boerne v. Flores, ___ U.S. ___,
117 S.Ct. 2157, 128 L.Ed.2d 624 (1997) 12

Commodity Futures Trading Commission v. Schor,
478 U.S. 833 (1986) 8

Cooper v. Aaron, 358 U.S. 1 (1958) 12

Dougan v. Singletary, 129 F.3d 1424
(11th Cir. 1997) 27

Gavin v. Branstad, 122 F.3d 1081
(8th Cir. 1997) 27

Gutierrez de Martinez v. Lamagno,
115 S.Ct. 2227 (1995) 21

Hadix v. Johnson, 792 F. Supp. 527
(E.D. Mich. 1992) 4

Hadix v. Johnson, 933 F. Supp. 1360
(E.D. Mich. 1996) 4

Hadix v. Johnson, 947 F. Supp. 1100
(E.D. Mich. 1996) . . . . . Passim

Hadix v. Johnson, Nos. 96-2463/2582,
1998 WL 7150 (6th Cir. Jan. 13, 1998) . . . . . Passim

Hayburn's Case, 2 U.S. (2 Dall.) 409,
1 L.Ed. 436 (1792) 8

Hodges v. Snyder, 261 U.S. 600 (1921) 17,25

Inmates of Suffolk County Jail v. Eisenstadt,
360 F. Supp. 676 (D. Mass. 1973) 10

Inmates of Suffolk County Jail v. Rouse,
129 F.3d 649 (1st Cir. 1997) 27

Ivan Allen Co. v. United States,
422 U.S. 617 (1975). 26

Johnston v. Cigna Corp., 14 F.3d 486
(10th Cir. 1993), cert. denied,
115 S.Ct. 1792 (1995). 25

Knop v. Johnson, 977 F. 2d 996
(6th Cir. 1992), cert. denied sub nom,
Knop v. McGinnis, 507 U.S. 973 (1993) 4

Lampf, Pleva, Lipkind, Prupis &
Pettigrew v. Gilbertson, 502 U.S. 350 (1991) 13

Local 93, International Association of
Firefighters v. City of Cleveland,
478 U.S. 501 (1986) 11,12

Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803) . 12,14

McCullough v. Virginia, 172 U.S. 102 (1898); 25

Memphis v. United States, 97 U.S. 293 (1877). 25

Mount Graham Coalition v. Thomas,
89 F.3d 554 (9th Cir. 1996) 19

Northern Pipeline Construction Co. v.
Marathon Pipe Line Co., 458 U.S. 50 (1982) 12

Oregon Department of Fish and Wildlife v.
Klamath Tribe, 473 U.S. 753 (1985) 26

Pennsylvania v. Wheeling & Belmont Bridge Co.,
54 U.S. (13 How.) 518 (1851) 17

Pennsylvania v. Wheeling & Belmont Bridge Co.,
59 U.S. (18 How.) 421 (1856) 16,17,18

Plaut v. Spendthrift Farm, Inc., 1 F.3d 1487
(6th Cir. 1993), aff'd, 115 S.Ct. 1447 (1995) 9

Plaut v. Spendthrift Farm, Inc., 514 U.S. 211,
115 S.Ct. 1447 (1995) . . . . . Passim

Plyler v. Moore, 100 F.3d 365 (4th Cir. 1996),
cert. denied, ___, U.S. ___, 117 S.Ct. 2460 (1997) . . . 26

Rufo v. Inmates of Suffolk County Jail,
502 U.S. 367 (1992) . . . . . Passim

System Federation v. Wright, 364 U.S. 642 (1960) 18,19,27

Tonya K. v. Board of Education of Chicago,
847 F.2d 1243, 1248 (7th Cir. 1988). 25

United States v. Klein, 80 U.S. 128 (1872) 21,22
23

United States v. National Bank of Commerce, 472 U.S. 713, 719 (1985) 26

United States v. O'Grady, 89 U.S. 641 (1874) 25

Western Union Telegraph v. Internat'l Brotherhood of Electrical Workers, 133 F.2d 955 (7th Cir. 1943) 19

White v. New Hampshire Department of Employment Sec., 455 U.S. 445 (1982) 21

CONSTITUTION, STATUTES, AND REGULATIONS

U.S. Const. Article III . . . . . Passim

18 U.S.C. § 3626(b) . . . . . Passim
18 U.S.C. § 3626(b)(2) 1
18 U.S.C. § 3626(b)(3) 15
18 U.S.C. § 3626(4)(2) 8
18 U.S.C. § 3626(g)(7), (9) 7
28 U.S.C. § 1254(1) 1
28 U.S.C. § 2403 5
42 U.S.C. § 1983 3

Administrative Procedures Act 14

Department of Justice Appropriation Act, 1995, Pub. L. No. 105-119, § 123(e)(2) 3,7

The Securities and Exchange Act of 1934, §27A 4, 5

LEGISLATIVE HISTORY

142 Cong. Rec. S2285-02, *2299 8

RULES

Fed. R. Civ. P. Rule 60(b) . . . . . Passim

SECONDARY SOURCES

John E. Nowak, Constitutional Law 67 (3rd Ed. 1986) . 8

Lawrence J. Sager, Constitutional Limitations on Congress' Authority to Regulate the Jurisdiction of Federal Courts, 95 Harv. L. Rev. 17 (1981) 16

Theodore Eisenberg, Congressional Authority to Restrict Lower Federal Court Jurisdiction, 83 Yale L.J., 498, 499 (1974) 16

Restatement (Second) of Judgments, §13, comment c (1982) 9

Michigan Manual at 452 (The Legislative Service Bureau 1995-96) 4

No. _____

PETITION FOR WRIT OF CERTIORARI

Petitioners, on behalf of themselves and all others similarly situated, respectfully petition this Court to issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The decision of the United States Court of Appeals for the Sixth Circuit (Apx. at 1) is reported as Hadix v. Johnson, Nos. 96-2463/2582, 1998 WL 71501 (6th Cir. Jan 13, 1998). The Order of the United States District Court for the Eastern District of Michigan, (Apx. at 7), from which appeal was taken by Defendants and Intervenor United States is reported at 947 F. Supp. 1100 (E.D. Mich. 1996).

JURISDICTION

The opinion of the United States Court of Appeals for the Sixth Circuit sought to be reviewed was entered on January 13, 1998.

This Court has jurisdiction to review the judgment pursuant to 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Article III, Section 1, of the Constitution provides in relevant part that:

> The judicial power of the United States, shall be vested in one Supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.

The Fifth Amendment to the Constitution provides in relevant part that:

> No person shall be...deprived of life, liberty, or property without due process of law... .

Section 802 of the Prison Litigation Reform Act of 1995, 18 U.S.C. § 3626(b) (West Supp. 1997), provides:

> (2) Immediate termination of prospective relief. - In any civil action with respect to prison conditions, a defendant or intervener shall be entitled to the immediate termination of any prospective relief if the relief was approved or granted in the absence of a finding by the court that the relief is narrowly drawn, extends no further than necessary to correct the violation of the Federal right, and is the least intrusive means necessary to correct the violation of the Federal right.
>
> (3) Limitation. -- Prospective relief shall not terminate if the court makes written findings based ont he record that prospective relief remains necessary to correct a current or

> ongoing violation of the Federal right, extends no further than necessary to correct the violation of the Federal right, and that the prospective relief is narrowly drawn and the least intrusive means necessary to correct the violation of the Federal right.[2]

Rule 60(b), Federal Rules of Civil Procedure, states as follows:

> On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: ...(5)...it is no longer equitable that the judgment should has prospective application.

STATEMENT OF THE CASE

This class action was filed under 42 U.S.C. § 1983 in 1980 in the United States District Court for the Eastern District of Michigan by prisoners incarcerated in the Central Complex of the State Prison of Southern Michigan (SPSM-CC).

> Built in 1926, this facility "is still considered to be the largest walled prison in

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[2] On November 26, 1997, the Congress passed and President signed the appropriation bill for the Departments of Commerce, Justice, State, and the Judiciary. The Act, Pub. L. No. 105-119, 111 Stat. 2440, included amendments to the Prison Litigation Reform Act, in pertinent part, inserting "current and ongoing violations" for the original language "current or ongoing violation" in section 3626(b)(3).

> the world with over 57 1/2 acres inside the Central Complex." Michigan Manual at 452 (The Legislative Service Bureau 1995-96).

District Court Opinion, Apx. at 35.

The Complaint alleges numerous violations of the Constitution. After extensive negotiation with the assistance of the court, the parties entered into and the court approved a consent decree designed to "assure the constitutionality of the conditions under which prisoners are incarcerated". Id. Apx. at 12. The comprehensive Consent Judgment addressed, inter alia, sanitation, safety and health, healthcare, fire safety, overcrowding and protection from harm, access to courts, food service, management, and mail. Id. Apx. at 10-12.[3]

While the process established to complete the requirements of the Consent Judgment and bring finality to the case was proceeding, the President signed into law the PLRA in 1995, which became effective April 26, 1996. Those provisions applicable to this appeal are contained in the amendments to 18 U.S.C. § 3626.

On June 10, 1996, the state Respondents filed motions pursuant to Section 802(b)(2) of the PLRA, 18

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[3] In 1992, the portions of the Hadix Decree involving medical and mental health care were transferred to the United States District Court for the Western District of Michigan. Hadix v. Johnson, 792 F. Supp. 527 (E.D. Mich. 1992). The United States participates as *amicus* in the medical and mental health portion of the Hadix case that is before Judge Enslen. Jurisdiction over the part of the Hadix case concerning access to courts was likewise transferred to the Western District. Knop v. Johnson, 977 F. 2d 996, 1014 (6th Cir. 1992), cert. denied, sub nom. Knop v. McGinnis, 507 U.S. 973 (1993); see, Hadix v. Johnson, 933 F. Supp. 1360 (E.D. Mich. 1996).

U.S.C. § 3626(b)(2), in both district courts having jurisdiction over the Hadix Consent Decree, for immediate termination of that Decree and subsequent orders granting prospective relief. The United States intervened in the district court, pursuant to 28 U.S.C. 2403, because the constitutionality of an Act of Congress was at issue.

On November 1, 1996, Judge Feikens denied state Respondents' motion for termination of the Hadix Decree and associated orders because of the Court's conclusion that Sections 3626(b)(2) and (b)(3) of the PLRA violate separation of powers principles and are, therefore, unconstitutional. Hadix v. Johnson, 947 F. Supp. 1100 (E.D. Mich. 1996). State Respondents appealed this denial which was reversed and remanded on January 13, 1998. Hadix v. Johnson, Nos. 96-2463/2582, 1998 WL 7150 (6th Cir. Jan. 13, 1998).

Petitioners herein request that this Court grant certiorari to review this decision.

REASONS FOR GRANTING WRIT

Petitioners challenge the constitutionality of the Prison Litigation Reform Act (PLRA) as violative of the separation of powers doctrine and due process. The particular provisions of the PLRA, referred to in this Petition as the immediate termination provisions, which form the basis for Petitioners' claim of unconstitutionality, are found at 18 U.S.C. § 3626(b)(2)-(3).

In applicable part, the Prison Litigation Reform Act of 1995, Pub. L. No. 104-134, 110, Stat. 1321, § 801-810 (April 24, 1996) (PLRA) provides in Section 3626(b)(2), for

the immediate termination of relief that was entered without the findings required by Section 3626(a)(1):

> In any civil action with respect to prison conditions, a defendant or intervenor shall be entitled to the immediate termination of any prospective relief if the relief was approved or granted in the absence of a finding by the court that the relief is narrowly drawn, extends no further than necessary to correct the violation of the federal right, and is the least intrusive means necessary to correct the violation of the federal right.

18 U.S.C. 3626(b)(2).

When termination is sought under subsection (b)(2), the PLRA dictates the requirements that must be met by the district court in its evaluation of the case if any prospective relief is to continue:

> If the court makes written findings based on the record that prospective relief remains necessary to correct a current or ongoing violation of the federal right, extends no further than necessary to correct the violation of the federal right, and that the prospective relief is narrowly drawn and the least intrusive means to correct the violation.

18 U.S.C. § 3626(b)(3).[4]

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[4] The phrase "current or ongoing violation" was recently amended to provide "current and ongoing violation." Department of Justice Appropriation Act, 1995, Pub. L. No. 105-119, § 123(e)(2). 111 Stat. 2440, 2470 (1997). The amendment is not material, however, for purposes of this appeal.

The Act also states that, for purposes of these provisions, injunctive relief under an existing consent judgment is to be considered "prospective relief." 18 U.S.C. 3626(g)(7), (9).

ARGUMENT

I. THE PRISON LITIGATION REFORM ACT'S TERMINATION PROVISION VIOLATES ARTICLE III OF THE CONSTITUTION AND THE SEPARATION OF POWERS DOCTRINE.

A. Introduction

> A legislature without exceeding its provence cannot reverse a determination once made, in a particular case; though it may prescribe a new rule for future cases. Plaut v. Spendthrift Farm, Inc., 514 U.S. 211, 115 S.Ct. 1447, 1455 (1995), quoting The Federalist, No. 91, p. 545 (J. Cooke ED 1961).

Such actions would impermissibly encroach upon the judicial powers created by Article III, Sect. 1, of the Constitution which provides:

> The judicial power of the United States shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish.

The district court herein properly recognized that the PLRA mandates the recision of a federal consent judgement, substituting in its place the application of retroactive legislation and as such is antithetical to the basic

precepts of the separation of powers. Apx. at 26. The Sixth Circuit disagreed, finding that Congress does not, through the PLRA, reopen a final judgment of the federal court, but merely affects prospective injunctive relief. Apx. at 4. However, it is not just the overturning of federal judgments that is impermissible but the "revision and control" as well. Hayburn's Case, 2 U.S. (2 Dall.) 409, 411, 1 L.Ed. 436 (1792). To rescind a final judgment through indirection is just as objectional as a direct termination. The Sixth Circuit has relied upon a distinction without a difference.

The allocation of judicial power to the courts "serves both to protect the role of the independent judiciary within the constitutional scheme of tripartite government, . . . and to safeguard litigant's right to have claims decided before judges who are free from potential domination by other branches of government." Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833, 848 (1986)(citations omitted).

Indeed, the basic principle articulated in Hayburn's Case is that "[t]he federal judiciary will not have its decisions in a case frustrated by having it subjected to revision, suspension, modification, or other review by the executive or legislative branches," John E. Nowak, Constitutional Law 67 (3rd Ed. 1986).

Pursuant to the PLRA, the party defendants in these cases are immediately released of all obligations stemming from judicial orders.[5] The plaintiffs are then required to [re]litigate their claims to prevent ongoing violations of

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[5] See Section 802(e)(2) of the PLRA, 18 U.S.C. § 3626(4)(2) which establishes an "automatic stay" which is nothing less than termination of the Consent Judgment unless and until the case is tried.

plaintiffs' constitutional rights in order to preserve some of the remedial relief previously assured by the consent judgment. If plaintiffs prevail, the available remedies and the ability of the courts to ensure compliance or further enforcement of those remedies are then severely curtailed by this Act. The PLRA requires no less than the elimination of existing judgments with which the Congress disagrees; it contemplates the very act (legislatively directed vacatur of judgments for retrial) which necessitated the constitutional separation of powers. Plaut v. Spendthrift Farms, Inc., 115 S.Ct. 1447 (1995) at 1453-54.

B. The Hadix Consent Judgment Represents A Final Judgment Of An Article III Court Which May Not Be Reopened By An Act Of Congress Via The PLRA

The rule of Plaut cannot be avoided by an argument that the definition of finality depends on the context, so that the Consent Judgment in this case does not constitute a final judgment for purposes of separation of powers restrictions.[6]

This Court held in Rufo v. Inmates of Suffolk County Jail, 502 U.S. 367 (1992) that the fact that consent judgments are injunctions over which the court retains continuing jurisdiction does not alter the fact that they are final judgments. The Consent Decree in that jail conditions case was entered in 1973 and explicitly provided that "[t]he court shall retain jurisdiction . . . and enter further orders as

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[6] The Sixth Circuit in Plaut, in rejecting a party's attempt to argue that one final judgment was "more final" than another, aptly noted: "Some final judgments are less final than others only to the extent that some pregnant women are less pregnant than others." Plaut v. Spendthrift Farm, Inc., 1 F.3d 1487, 1498 (6th Cir. 1993), aff'd, 115 S.Ct 1447 (1995).

may be required." Inmates of Suffolk County Jail v. Eisenstadt, 360 F. Supp. 676, 691 (D. Mass. 1973). This decision was not appealed. It was followed by further enforcement orders and appellate decisions, a new remedial plan, a consent decree in 1979, modifications to the Decree in 1985, and another motion for modification denied in 1990. Rufo, 502 U.S. at 373-76.

As would be expected in the same type of case, Hadix has a similar history. See e.g., district court opinion, Apx. at 9.

It was against this background in Rufo that the Supreme Court declared that "a consent decree is a final judgment that may be reopened only to the extent that equity requires." Id. at 391; accord Alberti v. Klevenhagen, 46 F.3d 1347, 1364-65 (5th Cir. 1995) ("that the 'Consent Judgment' was a final judgment on the merits is not undermined by the court's issuance of numerous [subsequent] orders").

It is this Court that directs the equitable requirements to be met by lower courts in meeting their core Article III responsibilities in the remediation of constitutional claims that have been resolved through a consent judgment. As discussed by the district court herein, this Court's decision in Rufo v. Inmates of Suffolk County Jail, 502 U.S. 367 (1992) is the most recent pronouncement of this Court. The district court observed:

> The Court illuminated this standard by citing three situations in which lower courts correctly modified a consent decree: 1) "when changed factual conditions make compliance with the decree substantially more onerous"; 2) "when a decree proves to be unworkable

> because of unforeseen obstacles"; or 3) "when enforcement of the decree without modification would be detrimental to the public interest". Id., 502 U.S. at 384, 112 S.Ct. at 760. The Court also refused to limit modification to only those situations in which unforeseen changes occurred. Id., 502 U.S. at 385, 112 S.Ct. at 760-61.
>
> I note with emphasis the Court's mandate that "[a] proposed modification should not strive to rewrite a consent decree so that it conforms to the constitutional floor." Id., 502 U.S. at 391, 112 S.Ct. at 764. Instead, once a court finds that modification is required, it should focus solely on whether the proposed modification best suits the change in circumstances. Id., The Court's reasoning is critical to this case: "A court should do no more, *for a consent decree is a final judgment* that may be reopened only to the extent that equity requires" (emphasis added). Id., 502 U.S. at 392, 112 S.Ct. at 764.

Retroactive application of a statute such as the PLRA to final consent judgments is problematic since such decrees "spring from and resolve a dispute within the [federal] court's subject-matter jurisdiction," Local 93, Int'l Ass'n of Firefighters v. City of Cleveland, 478 U.S. 501, 525 (1986), and include relief, agreed to by the parties, beyond what the substantive law requires. Rufo, 502 U.S. at 389. The most problematic application is to lawsuits which began with

allegations of unconstitutional action[7] by a person acting under color of state law, and ended with an agreement by the defendant to engage in a different course of action. The PLRA supposedly changes only the remedial jurisdiction of the federal courts in such constitutional cases. The Act, however, allows Congress retroactively to eviscerate a decree which was properly before the court at the time the decree issued and which promoted the objectives of the Constitution. Local 93, 478 U.S. at 525. Congress, of course, has no power over substantive constitutional rights except through its power to amend the Constitution itself. City of Boerne v. Flores, ___ U.S. ___, 117 S.Ct. 2157 (1997). Yet, the effect of the PLRA is to reopen the decisions by the parties and the adjudication of the court, see, Local 93, 478 U.S. at 543, (Rehnquist, J., dissenting), about how to promote substantive constitutional rights.

The conflict between the requirements of the PLRA and this Court's directives[8] for modification of consent decrees is only made more apparent by the opinion of the Sixth Circuit that is the subject of this Petition. The Court stated:

> ...The interpretation and application of law to fact and the ultimate resolution of prison condition cases remain at all times with the judiciary. Accordingly, the district court erred in holding that the PLRA's termination

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[7] See Northern Pipeline Constr. Co., v. Marathon Pipe Line Co., 458 U.S. 50, 83-84 (1982); cf. Cooper v. Aaron, 358 U.S. 1, 18 (1958); *accord*, Marbury v. Madison, 5 U.S. 137, 177 (1803).

[8] The PLRA edict regarding the standards for termination is also in conflict with this Court's decision in Board of Education of Oklahoma City Public Schools v. Dowell, 498 U.S. 237 (1991).

> provisions violate the separation-of-powers doctrine, and therefore we remand the matter for consideration of the merits of defendants' motion to terminate.
>
> REVERSED and REMANDED for further proceedings in accordance with this opinion.

Apx. at 6.

The district court is still obligated to follow the standards enunciated by this Court in Rufo and Local 93 unless and until this Court rules otherwise. For the reasons that follow it should not be necessary to change the standards set by This Court given the unconstitutionality of the PLRA.

C. The Retroactive Application of PLRA Violates Separation Of Powers For The Reasons Enunciated In Plaut

In the varied and inconsistent decisions of the circuits that have reviewed the termination provision of the PLRA, see section III, infra, and found it constitutional, the starting point for analysis is always Plaut. In Plaut, this Court had to resolve a conflict in the circuits over the constitutionality of §27A of the Securities and Exchange Act of 1934. Congress enacted §27A in response to this Court's decision in Lampf, Pleva, Lipkind, Prupis & Pettigrew v. Gilbertson, 502 U.S. 350 (1991), in which this Court held that earlier reliance on state statutes of limitations in certain securities litigation was erroneous, and announced a uniform statute of limitations to all such actions. This Court applied the Lampf rule to pending as well as future cases, resulting in dismissal of suits filed by plaintiffs like Plaut who had

relied on longer statutes of limitations in effect at the time of the filing. Congress quickly responded with §27A, which had the effect of reinstating earlier statutes for pending cases as well as restoring the suits that had been dismissed, if the plaintiffs could demonstrate to the court, within 90 days of the passage of §27A, that they had timely filed their complaints under the pre-Lampf law.

The Court stated at 514 U.S. at 218:

> We think...that §27A(b) offends a postulate of Art III...deeply rooted in our law. Article III established a "judicial department" with the "province and duty...to say what the law is" in particular cases and controversies. Marbury v. Madison, 1 Cranch 137, 177, 2 L.Ed. 60 (1803). The record of history shows that the Framers crafted this charter of the judicial department with an expressed understanding that it gives the Federal Judiciary the power, not merely to rule on cases, but to decide them, subject to review only by superior courts in the Article III hierarchy--.

In Plaut this Court insisted on a "categorical" rule of finality because any less general approach "prolongs doubt and multiplies confrontation." Id. at 115 S.Ct. 1457. Moreover, the categorical application of separation of powers principles follows from its role as a structural safeguard for our tripartite system of government:

> [T]he doctrine of separation of powers is a structural safeguard rather than a remedy to be applied only when specified harm, or risk of harm, can be identified. In its major

> features (of which the conclusiveness of judicial judgments is assuredly one) it is a prophylactic device, establishing high walls and clear distinctions because low walls and vague distinctions will not be judicially defensible in the heat of interbranch conflict.

Id. 115 S.Ct. at 1463.

The Court accordingly held that Congress cannot reopen final judgments of Article III courts consistent with the constitutional principle of separation of powers. It is no help for the Intervenor-Appellant to argue that the Consent Judgment can be saved by the application of Section 3626(b)(3) which provides that the relief need not terminate if the lower court can make specific findings that are dictated by the PLRA.

This very mechanism was addressed by the Plaut court when it cited with approval the 1868 Treatise of the constitutional scholar Thomas Cooley, which stated:

> If the legislature cannot thus indirectly control the action of the courts, by requiring of them a construction of the law according to its own views, it is very plain it cannot do so directly, by setting aside their judgments, compelling them to grant new trials . . . or directly what particular steps shall be taken in the progress of a judicial inquiry.

T. Cooley at 94-95, cited by Plaut at 115 S.Ct. 1456.

The Supreme Court in Plaut reemphasized that one of the evils the framers sought to remedy was "intermingled legislative and judicial powers" which were often manifested

in "judgments being vacated by legislative acts." Plaut, supra, 115 S.Ct. at 1453-54. This is precisely what the PLRA was designed to, and will, accomplish unless found to be an unconstitutional violation of the separation of powers doctrine.[9]

D. The "Wheeling Bridge II" Exception to Separation of Powers Principle Does Not Apply Here

In the appellate decisions regarding the PLRA termination provision there been a misplaced reliance placed on a cryptic reference in Plaut to Pennsylvania v. Wheeling & Belmont Bridge Co., 59 U.S. (18 How.) 421 (1856) for the proposition that injunctions are not final for separation of powers purposes and are exceptions to the rule of Plaut. In Plaut the majority characterized as inapposite some cases which it found inconsistent with its reasoning.[10]

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[9] During the 1960s, a period of legislative antagonism to constitutional decisions of the Supreme Court, over 50 unsuccessful bills were introduced to curtail federal jurisdiction. Theodore Eisenberg, Congressional Authority to Restrict Lower Federal Court Jurisdiction, 83 Yale L.J., 498, 499 (1974); Lawrence J. Sager, Constitutional Limitations on Congress' Authority to Regulate the Jurisdiction of Federal Courts, 95 Harv. L. Rev. 17 (1981) (noting subsequent bills seeking to strip federal court's remedial powers or jurisdiction with respect to school desegregation, abortion rights, school prayer).

[10] Petitioners also rely on a miscellany of decisions upholding legislation that altered rights fixed by the final judgments of non-Article III courts, see., e.g., Sampeyreac v. United States; Freeborn v. Smith, or administrative agencies, Paramino Lumber Co. v. Marshall, or that altered the prospective effect of injunctions entered by Article III courts, [Pennsylvania v.] Wheeling & Belmont Bridge, [59 U.S.] 18 How. 421

Without specifically referencing Wheeling Bridge, the Sixth Circuit paraphrases the statement from Plaut in its opinion. Apx. at 5.

In Pennsylvania v. Wheeling & Belmont Bridge Co., 59 U.S. (18 How.) 421 (1855) ("Wheeling Bridge II") Pennsylvania had obtained a final injunction requiring that a bridge be removed because it was a hazard to navigation and therefore a public nuisance. See Pennsylvania v. Wheeling & Belmont Bridge Co., 54 U.S. (13 How.) 518 (1851) ("Wheeling Bridge I"). Congress then amended the law to legalize the bridge by making it a post-road. Wheeling Bridge II, 59 U.S. at 429. The Supreme Court rejected a subsequent motion to enforce the injunction because the injunction had been based upon "the public right of the free navigation of the river," which Congress had the power to alter[11], the Court agreed that the order should be altered to allow the bridge to exist. Wheeling Bridge II, 59 U.S. at 431.[12]

> [(1856)]["Wheeling II"]. *These cases distinguish themselves; nothing in our holding today calls them into question.*

Plaut, 514 U.S. at 232 (emphasis supplied, citations omitted).

[11] Congress has plenary power over the "public right" of navigation. Wheeling Bridge II, 59 U.S. at 431.

[12] Similarly, in Hodges v. Snyder, 261 U.S. 600 (1921), plaintiffs obtained a final injunction against the creation of a consolidated school district on the basis that such a district had not been authorized by the state legislature. Subsequently the state legislature changed the law to allow for consolidated school districts. A state court vacated the injunction based on this new legislation, and the Supreme Court upheld the vacatur, holding that an injunction based on rights which "may be annulled by subsequent legislation" may be vacated, even though the judgment was final. 261 U.S.

Similarly, in System Federation v. Wright, 364 U.S. 642 (1960), a consent decree forbade the defendant union and railway from discriminating against non-union workers. Id. at 643. Congress later amended the Railway Labor Act to permit union shops, allowing the discrimination against non-union workers that had formerly been banned. The Supreme Court held that Defendants' Rule 60(b) motion should have been granted because a court

> must be free to modify the terms of a consent decree when a change in law brings those terms in conflict with statutory objectives. In short, it was the Railway Labor Act, and only incidentally the parties, that the District Court served in entering the consent decree now before us. The court must be free to continue to further the objectives of the Act when its provisions are amended.

364 U.S. at 651.[13]

These cases hold that when Congress validly alters

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at 603. The Court specifically noted that the creation and alteration of school boundaries was within the inherent power of the legislature, 261 U.S. at 602, and thus could be changed by subsequent legislation. Although Hodges involved state law and state court judgments, and was decided on due process and not separation of powers grounds, it makes the same distinction as Wheeling Bridge II, i.e., that the legislature can affect a final judgment when it has plenary power over the underlying law.

[13] See also, Mount Graham Coalition v. Thomas, 89 F.3d 554 (9th Cir. 1996); Western Union Telegraph v. Internat'l Brotherhood of Electrical Workers, 133 F.2d 955, 957-958 (7th Cir. 1943). These cases, starting with Wheeling Bridge II, "distinguish themselves" from Plaut, because they do not uphold Congressional actions which mandate the reopening of final judgments, as did §27A and as does the PLRA.

the substantive law that an injunction was based on, courts may prospectively alter the injunction to take account of the changed legal circumstances. In other words, an injunctive judgment is vulnerable to reopening on the basis of legislation to the extent that the legislature has the power to alter the legal rights on which the judgment was based. The difference between a change in the underlying substantive law and a change in the court's remedial powers is substantial, particularly in the context of the retroactive application of the change to an established judicial order.

E. Defendants' Attempt to Distinguish The Consent Judgment Because of "Prospective Relief" Must Fail

The Sixth Circuit attempted to distinguish the PLRA's interference with final judgments by asserting that the PLRA requires only termination of "prospective relief".[14] This argument is unavailing. As the district court held:

> The acts use of the term 'prospective relief' masks the real issue. Injunctive relief affects conditions as they arise. Past injunctive relief cannot be changed as time cannot be turned back. The issue then is this: can injunctive relief based on past negotiations, cost assessments and compromises between parties be overturned by an act of Congress.

Apx. at 27.

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[14] The Sixth Circuit also accepted the claim that underlying substantive law changes such as in Wright are the same as the changes wrought by the PLRA.

The district court correctly concluded that it is not "prospective relief" that the PLRA purports to alter but the Consent Judgment itself.

The conclusion of the Sixth Circuit fails to consider that all judgments are subject to the court's potential jurisdiction. Even monetary judgments which have not been fully collected upon can result in the court's jurisdiction being invoked for the purpose of obtaining enforcement relief. Indeed, this was the argument made by the claimants in Plaut. The Court held, however, that the fact that a court retains jurisdiction to modify a judgment under Rule 60(b) does not suggest that Congress has a similar power.

Like any judgment which contains elements of prospective or ongoing relief, Fed. R. Civ. P. 60(b) applies. However, this contemplates that an Article III court will use its inherent equity powers to review the necessity for modification of its own judgments. Modification, based upon the application of judicial equity principles, not termination dictated by the legislature which possesses no such power, is all that is permissible.

Plaut holds explicitly that Rule 60(b) "does not impose any legislative mandate to reopen upon the courts, but merely reflects and confirms the court's own inherent and discretionary power, 'firmly established in English practice long before the foundation of our Republic,' to set aside a judgment whose enforcement would work an inequity." 115 S.Ct. at 1460 (emphasis supplied, citation omitted). Rule 60(b) itself explicitly states that "[a] motion under this subdivision (b) does not affect the finality of a

judgment or suspend its operation."[15]

F. The Termination Provision Unconstitutionally Prescribes Rules of Decision

The Supreme Court held in United States v. Klein, 80 U.S. 128 (1872), that Congress may not "prescribe rules of decision" to the courts in cases pending before them without violating the separation of powers. Id. at 146. See Gutierrez de Martinez v. Lamagno, ___ U.S. ___, 115 S.Ct. 2227, 2234 (1995) (citing Klein).

In Klein, an ex-Confederate who had been granted a presidential pardon sued for the proceeds of property that had been confiscated by the government during the Civil War. Pursuant to his constitutional pardon power, the President had granted a pardon with restoration of all rights of property to any ex-Confederate who signed a loyalty oath. The Court of Claims had decided, in a prior decision affirmed by the Supreme Court, that such a pardon entitled the claimant to payment for confiscated property. Thereafter, Congress passed a law making such pardons inadmissible in evidence to establish a claimant's entitlement to the confiscated property, and instead making them conclusive evidence that the bearer had aided in the rebellion and grounds for dismissal of the claim. If the Court of Claims had already ruled in the claimant's favor, the statute deprived the Supreme Court of appellate

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[15] *Accord*, White v. New Hampshire Dep't of Employment Sec., 455 U.S. 445, 455 (1982) ("many final orders may issue" in the course of injunctive litigation)(dicta); *Restatement (Second) of Judgments, §13*, comment c (1982) (stating that a judgment granting continuing relief is not deprived of finality for res judicata purposes).

jurisdiction and directed dismissal of the case.

The Court held that this attempt to "prescribe rules of decision" violated the separation of powers because it prohibited the court from giving "the effect to evidence which, in its own judgment, such evidence should have," and directed the court to "give it [the evidence] an effect precisely the contrary." Klein, 80 U.S. at 147. The Court continued:

> The court is required to ascertain the existence of certain facts and thereupon to declare that its jurisdiction on appeal has ceased, by dismissing the bill. What is this but to prescribe a rule for the decision of the cause in a particular way? . . .
>
> We must think that Congress has inadvertently passed the limit which separates the legislative from the judicial power . . .

Id. at 146-47.

Klein stands for the proposition that Congress may not usurp the adjudicative function that Article III assigns to the federal courts by directing an interpretation, application, or outcome in any case, unless it changes the underlying substantive law on which the base is based. The PLRA's provision for termination of judgments crosses that line.

Specifically, the PLRA provides that a valid and final judgment of an Article III court is to be vacated if the court finds that the judgment lacks the findings prescribed by the statute. The analogy to Klein is plain. Here, the lack of findings mandates vacation of the relief. In Klein, the presence of a pardon mandated dismissal of the action. And here, as in Klein, the statute directs the court to give an

effect to certain facts that is directly opposite the effect that the court believes--and common sense dictates--that those facts should have. In Klein, the statute said that a pardon--which under then-established law entitled the claimant to the return of his property--dictated dismissal of the claimant's suit. Here, the statute says that the absence of certain findings -- which shows only that the case was settled without trial -- dictates the vacation of the relief. "What is this but to prescribe a rule for the decision of the cause in a particular way?" Klein, 80 U.S. at 146.[16]

The fact that the PLRA's usurpation operates at the remedial stage of the case, long after judgment, does not remove it from the scope of the Klein rule. For a court of equity, the formulation, administration, and ultimate vacation of a remedy is as much a part of the judicial function as is the determination of liability. It is the judiciary's exercise of that power, under standards formulated by the courts, that the PLRA is designed to displace.

The Sixth Circuit took the position, Apx. at 5, that the PLRA only dictates the standard to be followed, not the result.

It is no answer to say that § 3626(b)(3) of the PLRA does not prescribe the ultimate outcome of the case, since it permits the retention of relief insofar as it is shown to be necessary to remedy a federal law violation. That is precisely what the Plaintiffs would have had to show in the

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[16] The analogy to Klein is clear in another respect. Here, as in Klein, the legislative history shows that the precise purpose of the statute is to reverse the outcomes of litigation simply because members of Congress disagreed with and disapproved of the results as occurred with this case.

first instance to obtain relief, had the case not been settled. Under this view, the PLRA in substance prescribes new trials in cases in which judgments do not contain the required findings. But the legislative vacatur of judgments for retrial was one of the specific evils remedied by the constitutional principle of separation of powers. Plaut, 115 S.Ct. at 1453-54.

Nor can it be argued that the PLRA does not prescribe a rule of decision, but is simply a more strict codification of Rufo, requiring a court to consider modification under certain circumstances. That position is inconsistent with Rufo, which holds that decrees may be modified based on changes in the substantive law -- i.e., "when the statutory or decisional law has changed to make legal what the decree was designed to prevent." 502 U.S. at 388. Indeed, Rufo explicitly declares that "[a] proposed modification should not strive to rewrite a consent decree so that in conforms to the constitutional floor." Id. at 391. Only the judicial branch, not the legislative, can decide when and how to modify its judgments. The PLRA requires the court to "modify", restricting the court's equitable and remedial power. This power rests solely with the judiciary. The PLRA mandates the modification of the prospective relief required by the Consent Judgment, not to be tailored to a change in factual circumstances, not be based on the remedial needs based upon the factual circumstances and ordered pursuant to the Court's equitable powers, but to be based on a preset minimum level mandated by Congress.

II. DUE PROCESS AND THE VESTED RIGHTS DOCTRINE

Petitioners challenge the immediate termination provisions of the PLRA on due process grounds similar to,

but theoretically distinct from, their challenge on separation of powers. Judgments have long been viewed as a form of property protected from governmental divestment:

> It is not within the power of a legislature to take away rights which have been once vested by a judgement. Legislation may act on subsequent proceedings, may abate actions pending, but when those actions have passed into judgment, the power of the legislature to disturb the rights created thereby ceases.

McCullough v. Virginia, 172 U.S. 102, 123-124 (1898); accord, Hodges v. Snyder, 261 U.S. at 603; Memphis v. United States, 97 U.S. 293, 296 (1877). McCullough remains good law. See e.g. Johnston v. Cigna Corp., 14 F.3d 486, 490-91 (10th Cir. 1993), cert. denied, 115 S.Ct. 1792 (1995). As Judge Easterbrook wrote for the Seventh Circuit when it explicitly rejected the argument that there are not vested rights in a consent decree because modification under Rule 60(b) is available: "On this view, there are no 'rights' of any kind and every decision fixing interests in property is forever malleable. We doubt the Supreme Court would take that view unless it is willing to overrule Hodges [v. Snyder], [United States v.] O'Grady, [89 U.S. 641 (1874) and Wheeling & Belmont Bridge and jettison the doctrine." Tonya K. v. Board of Education of Chicago, 847 F.2d 1243, 1248 (7th Cir. 1988).

When the parties entered into the Consent Judgment they understood and accepted that the Court retained its equitable power to modify if changes in fact or law made it necessary; the parties had no expectation that the Consent Judgment would be abrogated after settlement and a trial mandated by Congress.

III. THE CONFLICT AMONG THE CIRCUIT COURTS OF APPEAL CONCERNING THE IMMEDIATE TERMINATION PROVISIONS OF THE PLRA SHOULD BE RESOLVED BY THIS COURT.

As of the writing of this petition, six circuit courts have addressed the constitutionality of the PLRA. Although all of the circuits have held that the PLRA is constitutional, they have employed such contradictory reasoning that inconsistent and unpredictable results will plague both prison litigation and the application of the separation of powers doctrine in injunctive litigation as a whole unless certiorari is granted in this case. This Court has repeatedly held that such review is appropriate when there is a conflict between the general principles or reasoning adopted in the several courts of appeals. United States v. National Bank of Commerce, 472 U.S. 713, 719 (1985); Oregon Dept. of Fish and Wildlife v. Klamath Tribe, 473 U.S. 753, 764 (1985), Ivan Allen Co. v. United States, 422 U.S. 617, 623-34 (1975).

Because a consent judgment is a unique blend of settlement and equitable judicial authority, a separation of powers analysis of the retroactive application of the PLRA is far more complex than the inconsistent analyses that have been made by the circuits in an effort to fit the cases into established arguments that do not apply. This problem is compounded by the PLRA which is certainly a first effort at micromanagement of the judicial function as opposed to enactment of substantive law. The various positions are unclear and in conflict and, unfortunately, seem to miss the fundamental question of the responsibilities of the judicial branch and the limitations of the legislature.

In Plyler v. Moore, 100 F.3d 365 (4th Cir. 1996), cert. denied, ___ U.S. ___, 117 S.Ct. 2460 (1997) the court found that a consent judgment is not a final judgment as defined in Plaut. It then found that the PLRA termination provision is a change in substantive law just as was the case in System Fed'n No. 91 v. Wright, supra. The Court terminated the consent judgment.

In Dougan v. Singletary, 129 F.3d 1424 (11th Cir. 1997) the Court recognized that consent judgments are final judgments but not the "last word" in the case. The case has been remanded to the district court for final consideration.

In Gavin v. Branstad, 122 F.3d 1081 (8th Cir. 1997), petition for cert filed (U.S. Jan. 5, 1998) the Court recognized that the consent judgment did not come within the Wheeling Bridge exception because it was not a change in the underlying substantive law; indeed, the Court noted that the underlying basis for plaintiffs' case was the Constitution which Congress cannot alter. Gavin, thus, rejects the basis used in Plyler and Dougan[17] to find the PLRA termination provision constitutional. The Court in Gavin then proceeded to find the PLRA termination provision constitutional on the grounds that Congress has the authority to control the remedial powers of Article III courts. The court remanded the case for further proceedings.

Inmates of Suffolk County Jail v. Rouse, 129 F.3d 649 (1st Cir. 1997), petition for cert. filed (U.S. Feb. 4, 198). Following the approach of the Court in Plyler the Court in Rouse found the PLRA termination provision to be a change in the underlying substantive law citing Wheeling

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[17] The Court in Gavin finds a consent judgment to be the "last word" contrary to the Court in Dougan, but finds the "last word" to be temporal.

Bridge and Wright. The Court rejects the reasoning of the court in Benjamin v. Jacobson, 124 F.3d 162 (2d Cir. 1997), reh'g granted en banc (2d Cir. Dec. 23, 1997).[18] The Court directed that the consent judgment be terminated.

Benjamin v. Jacobson, 124 F.3d 162 (2d Cir. 1997, reh'g granted en banc (2d Cir. December 23, 1997). Although other circuits have noted that a consent judgment is both a contract and a judgment the court takes the position that the PLRA termination provision only established a different forum (state court) in which the consent judgment can be enforced; noting specifically that if it were more than a legislative limitation of the remedial jurisdiction of federal courts it would be unconstitutional. The Court emphasized that this interpretation required that the underlying consent judgment not be disturbed.

Hadix v. Johnson, Nos. 96-2463;2582, 1998 WL 7150 (6th Cir. Jan. 13, 1998). In this decision, that is the basis for this Petition, the Sixth Circuit referenced each of the previous five decisions and in a brief per curiam opinion adopted all of the positions of all of the other circuits, inconsistent and contradictory as they are, and remanded the case to the district court for further proceedings.

The Sixth Circuit specifically noted:

> Although the parties entered into a consent decree containing provisions for prospective relief, that does not mean they are guaranteed that implementation of the decree will proceed undisturbed by legislative action.

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[18] Dougan also specifically rejected the reasoning of Benjamin.

Apx. at 5.

This concluding sentence again demonstrates the mistake made throughout the circuit court decisions. The parties certainly anticipated when they entered into the consent judgment that the court exercising its equitable judicial authority might modify the consent decree under the standards enunciated by this Court in Rufo v. Inmates of Suffolk County Jail, 502 U.S. 367 (1992) and Board of Education of Oklahoma City Public Schools v. Dowell, 498 U.S. 237 (1991). Changes by higher courts in the judicial hierarchy is to be expected; usurpation of this judicial function by the legislature is quite another matter.

Because of the inconsistencies described above and because of the national importance of the effects of the immediate termination provision of the PLRA, this Court should grant certiorari in this case. If the PLRA is constitutional, then it should be this Court that affirms that Congress may assume the role denied it in Plaut of a national "court of error" prohibiting enforcement in the federal courts to any injunction that displeases it.

CONCLUSION

For all the reasons argued above, Petitioners respectfully urge this Court to grant the Petition for a Writ of Certiorari.

Respectfully submitted,

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DATED: April 9, 1998

APPENDIX

RECOMMENDED FOR FULL-TEXT PUBLICATION
Pursuant to Sixth Circuit Rule 24

ELECTRONIC CITATION: 1998 FED App. 0012P (6th Cir.)
File Name: 98a0012p.06

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

EVERETT HADIX, et al.,
Plaintiffs-Appellees,

v.

PERRY M. JOHNSON, et al.,
Defendants-Appellants (96-2463),

UNITED STATES OF AMERICA,
Intervenor-Appellant (96-2582).

Nos. 96-2463/2582

Appeal from the United States District Court
for the Eastern District of Michigan at Detroit.
No. 80-73581--John Feikens, District Judge.

Argued: December 8, 1997

Decided and Filed: January 13, 1998

Before: GUY, NELSON, and DAUGHTREY, Circuit Judges.

COUNSEL

ARGUED: Susan Przekop-Shaw, OFFICE OF THE ATTORNEY GENERAL, CORRECTIONS DIVISION, Lansing, Michigan, Marie K. McElderry, U.S. DEPARTMENT OF JUSTICE CIVIL RIGHTS DIVISION, APPELLATE SECTION, Washington, D.C., for Appellants. Michael Barnhart, Detroit, Michigan, for Appellees. **ON BRIEF:** Susan Przekop-Shaw, OFFICE OF THE ATTORNEY GENERAL, CORRECTIONS DIVISION, Lansing, Michigan, Marie K. McElderry, David K. Flynn, U.S. DEPARTMENT OF JUSTICE CIVIL RIGHTS DIVISION, APPELLATE SECTION, Washington, D.C., for Appellants. Michael Barnhart, Detroit, Michigan, Patricia A. Streeter, Detroit, Michigan, Deborah A. LaBelle, Ann Arbor, Michigan, for Appellees.

OPINION

PER CURIAM. This is a prisoner civil rights case in which the defendants challenge the district court's denial of their motion to terminate injunctive relief. The motion was filed pursuant to Section 802 of the Prison Litigation Reform Act, Pub. L. No. 104-134, 110 Stat. 1321-66 (1996) (codified in relevant part at 18 U.S.C. § 3626). The challenged relief is contained in a consent decree that was previously entered in the case. The district court found that the termination provisions of the Prison Litigation Reform Act, 18 U.S.C. § 3626(b)(2)-(3), violate the doctrine of separation of powers and are unconstitutional. Accordingly, the court denied defendants' motion to terminate. The United States intervened in the matter pursuant to 28 U.S.C. § 2403. Because we conclude the provisions do not violate separation-of-powers doctrine, we reverse and remand for consideration of the merits of defendants' motion.

I.

In 1980, plaintiffs, inmates at the State Prison of Southern Michigan, Central Complex, brought a class action pursuant to 42 U.S.C. § 1983 against various state prison officials. The inmates alleged unconstitutional conditions of confinement. In 1985, a consent decree was entered between the parties and approved by the court addressing various aspects of prison life, including safety, sanitation, hygiene, and protection from harm. The State did not admit liability. Over the years, the district court has issued several remedial orders, some of which also have come before this court on appeal.

In 1996, the Prison Litigation Reform Act (PLRA or Act) became law. The PLRA was designed to reduce judicial involvement in prison administration. To that end, it entitled defendants in prison condition lawsuits to

> immediate termination of any prospective relief if the relief was approved or granted in the absence of a finding by the court that the relief is narrowly drawn, extends no further than necessary to correct the violation of the Federal right, and is the least intrusive means necessary to correct the violation of the Federal right.

Id. § 3626(b)(2). The Act further provides, however, that "[p]rospective relief shall not terminate if the court makes written findings based on the record that prospective relief remains necessary to correct a current or ongoing violation of the Federal right, extends no further than necessary to correct the violation of the Federal right, and that the prospective relief is narrowly drawn and the least intrusive means to correct the violation." *Id.* § 3626(b)(3).[1] Accordingly,

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[1]The phrase "current or ongoing violation" was recently amended to provide "current and ongoing violation." Department of Justice Appropriations Act, 1998, Pub. L. No. 105-119, § 123(a)(2), 111 Stat. 2440, 2470 (1997). The amendment is not material, however, for purposes of this appeal.

defendants moved to terminate the consent decree. They also invoked the Act's automatic stay provision, which provided that any prospective relief subject to a pending motion shall be stayed beginning 30 days after the motion to terminate is filed. *Id.* § 3626(e)(2)(A)(i).[2] The district court, in an order dated July 5, 1996, held that the automatic stay provision was unconstitutional. That ruling is currently on appeal in *Hadix v. Johnson*, No. 96-1943 (6th Cir. filed Aug. 5, 1996). On September 19, 1996, the Sixth Circuit issued an order granting defendants' motion seeking a stay of certain relief under the consent decree pending appeal of the automatic stay decision. On November 1, 1996, the district court denied defendants' motion to terminate on separation-of-powers grounds. *Hadix v. Johnson*, 947 F. Supp. 1100 (E.D. Mich. 1996). Defendants now appeal.

II.

We consider whether the immediate termination provisions of the PLRA, 18 U.S.C. § 3626(b)(2)-(3), violate the separation-of-powers doctrine. We review such a question of law under a de novo standard of review. *See, e.g., Long v. Norris*, 929 F.2d 1111, 1114 (6th Cir. 1991).

The district court concluded that the provisions violated the separation-of-powers doctrine in two ways. First, the court found that the Act required courts to reopen a final judgment in violation of the rule that Congress may not interfere with judgments of Article III courts. *See Plaut v. Spendthrift Farm, Inc.*, 514 U.S 211, 218 (1995). Second, it opined that the provisions mandate the result in a particular case. *See United States v. Klein*, 80 U.S. (13 Wall.) 128, 146-47 (1871). We consider these issues in turn.

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[2] That provision has subsequently been amended to permit postponement of the effective date of an automatic stay by 60 days for good cause. § 123(a)(3)(C), 111 Stat. at 2470.

A. Reopening of a Final Judgment

Defendants contend that the district court erred in ruling that the PLRA termination provisions impermissibly reopen a final judgment. Several circuits have examined this issue and have found that the provisions do not require such a reopening; rather, they merely alter the prospective application of orders requiring injunctive relief. *See, e.g., Dougan v. Singletary*, No. 93-2008, 1997 WL 738227, at *2 (11th Cir. Dec. 1, 1997) (district courts retain jurisdiction to amend consent decrees as significant changes in law and fact require); *Inmates of Suffolk County Jail v. Rouse*, No. 97-1261, 1997 WL 685532, at *6 (1st Cir. Nov. 7, 1997) (consent decrees mandating forward-looking injunctions are final judgments subject to revision to the extent required by equity); *Benjamin v. Jacobson*, 124 F.3d 162, 173 (2d Cir. 1997) (termination provision merely limits remedial jurisdiction of federal courts); *Gavin v. Branstad*, 122 F.3d 1081, 1087 (8th Cir. 1997) (consent decree is an executory form of relief that remains subject to later developments); *Plyer v. Moore*, 100 F.3d 365, 371 (4th Cir. 1996) (judgment providing for injunctive relief remains subject to subsequent changes in the law). We agree with these courts and adopt their analysis in concluding that the prospective equitable relief contained in the *Hadix* consent decree remains subject to subsequent changes in the law. Although the parties entered into a consent decree containing provisions for prospective relief, that does not mean they are guaranteed that implementation of the decree will proceed undisturbed by legislative action.

B. Prescribing a Rule of Decision

Defendants also challenge the district court's determination that the termination provision in effect prescribes a rule of decision by attempting to rescind the consent decree. Again, several circuits have rejected this view. *See Inmates*, 1997 WL 685532, at *8; *Benjamin*, 124 F.3d at 174; *Gavin*, 122 F.3d at 1089; *Plyer*, 100 F.3d at 372. We agree with these courts and conclude that the termination provision only prescribes the standard for authorizing a remedy in any given

case. It does not dictate the result a court must reach in determining whether relief is warranted. The interpretation and application of law to fact and the ultimate resolution of prison condition cases remain at all times with the judiciary. Accordingly, the district court erred in holding that the PLRA's termination provisions violate the separation-of-powers doctrine, and therefore we remand the matter for consideration of the merits of defendants' motion to terminate.[3]

REVERSED and REMANDED for further proceedings in accordance with this opinion.

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[3]The district court held the PLRA's immediate termination provisions unconstitutional solely on separation-of-powers grounds. Plaintiffs, however, also challenged these provisions on due process and equal protection grounds. The First, Second, Eighth, and Eleventh Circuits have all rejected these grounds as well in upholding the constitutionality of the termination provision. *See Dougan*, 1997 WL 738227, at *2; *Inmates*, 1997 WL 685532, at *8-*12; *Benjamin*, 124 F.3d at 174-76; *Gavin*, 122 F.3d at 1089-92. Were these grounds before us, we would similarly reject them. A consent decree in which the relief is provided subject to future modification cannot create a vested property right in that relief for due process purposes. *See generally Landgraf v. USI Film Prods.*, 511 U.S. 244, 274 (1994) (injunctions operate prospectively and litigants have no vested rights in them). In addition, as the other circuits have held, the immediate termination provisions of the PLRA do not target a suspect class or burden a fundamental right. Applying rational-basis scrutiny, we find the statute is rationally-related to the legitimate state interest of curbing judicial involvement in prison administration.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

EVERETT HADIX, et al.,

Plaintiffs,

v. Case No. 80-73581
HON. JOHN FEIKENS

PERRY JOHNSON, et al.,

Defendants.
_____/

OPINION AND ORDER

I. BACKGROUND

A. Issues

Defendants move to terminate relief ordered by a consent decree entered into and approved by me in 1985. Numerous remedial orders were triggered by the mandates of the consent decree. References to these matters are recorded in Hadix cases: 694 F.Supp. 259 (E.D. Mich. 1988), 712 F.Supp. 550 (E.D. Mich. 1989), 740 F.Supp. 433 (E.D. Mich. 1990), 792 F.Supp. 527 (E.D. Mich. 1992), and 896 F.Supp. 697 (E.D. Mich. 1995).

Defendants' motion is based on the Prison Litigation Reform Act ("PLRA" or "the Act"), effective as of April 26, 1996. The specific section of the Act on which defendants

rely is 18 U.S.C. §3626(b)(2), which reads:

> In any civil action with respect to prison conditions, a defendant or intervenor shall be entitled to the immediate termination of any prospective relief if the relief was approved or granted in the absence of a finding by the court that the relief is narrowly drawn, extends no further than necessary to correct the violation of the Federal right, and is the least intrusive means necessary to correct the violation of the Federal right.

Defendants contend that §3626(b)(3)[1] does not apply to this case. Intervenor,[2] the U.S. Department of Justice, contends that §3626(b)(3) is applicable and that, without it, the statute is unconstitutional.

Thus defendants and the intervenor raise two issues and both must be addressed. Defendants argue that the Act terminates the consent decree and orders stemming from the decree because the consent decree was not based on findings

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[1] That section provides:

> Prospective relief shall not terminate if the court makes written findings based on the record that prospective relief remains necessary to correct a current or ongoing violation of the Federal right, extends no further than necessary to correct the violation of the Federal right, and that the prospective relief is narrowly drawn and the least intrusive means to correct the violation.

[2] The United States may intervene as of right when the constitutionality of any Act of Congress affecting the public interest is at issue pursuant to 28 U.S.C. §2403.

by the court that the relief afforded was narrowly drawn, extended no further than necessary to correct the violation of the Federal rights involved, and is not the least intrusive means to correct the violation of the Federal right.

Intervenor argues that what saves the termination provisions of the Act from being unconstitutional is §3626(b)(3), which prohibits termination if the court makes findings of constitutional violations and then uses the requisite tests to determine whether such relief shall continue.

Plaintiffs argue that the PLRA violates separation of powers principles, as well as their due process and equal protection rights under the U.S. Constitution. I need only address one of these issues: Is the constitutional doctrine of separation of powers implicated in the PLRA as the defendants and the intervenor seek to apply it to this case?

Also pending before me on remand is defendants' motion to terminate the consent decree under Fed.R.Civ.P. 60(b), on which I originally ruled in an opinion on March 14, 1995.

B. Hadix Consent Decree

In 1980 a complaint was filed by prisoners of the State Prison of Southern Michigan ("SPSM") against officials of the State of Michigan alleging that conditions of their confinement violated their constitutional rights. The plaintiffs were certified as a class in 1981, and ten other cases filed between 1979 and 1985 raising similar issues were consolidated with Hadix. In 1985, after numerous conferences between the parties, a comprehensive consent decree was entered into, filed, and approved by me.

A sampling of prison cases reveals that the constitutionality of the areas at the heart of this judgment continue to be extensively litigated in other jurisdictions throughout this nation. See, for example, the following cases raising constitutional issues obviated by the consent decree here:

> **Sanitation, Safety and Health:** Farmer v. Brennan, 511 U.S. 825, 114 S.Ct. 1970, 128 L.Ed.2d 811 (1994) (While the Constitution does not mandate comfortable prisons, "neither does it permit inhumane ones." Since inmates are forced to be there, and are stripped "of virtually every means of self-protection and foreclosed their access to outside aid" prison officials "are not free to let the state of nature take its course.");
>
> **Health Care:** Madrid v. Gomez, 889 F.Supp. 1146 (N.D.Cal. 1995) (Where prison official hired a visiting psychiatrist for periodic visits and then substituted a psychiatrist who resigned after one month, further substitution of nine on-call psychiatrists still did not meet the mental health needs of prisoners in a population of 1,000 to 1,500 in the Security Housing Unit alone.);
>
> **Fire Safety:** Masonoff v. DuBois, 899 F.Supp. 782, 789 (D.Mass. 1995) ("There is no question that fire safety is a legitimate concern under the Eighth Amendment....");
>
> **Overcrowding and Protection from Harm:** LaMarca v. Turner, 995 F.2d 1526 (llth Cir. 1993) (Pervasive risk of harm was found where

prisoners were exposed to constant violence in dark, overcrowded cells.); Smith v. Norris, 877 F.Supp. 1296 (E.D.Ark. 1995) (Prison must take reasonable measures to protect inmates, including regular spot checks of open barracks.); Choate v. Lockhart, 7 F.3d 1370 (8th Cir. 1993) (Work assignments are considered conditions of confinement subject to scrutiny under the Eighth Amendment);

Access to Courts: McMaster v. Minnesota, 819 F.Supp. 1429 (D.Minn. 1993), *aff'd*, 30 F.3d 976 (8th Cir. 1994) (Where plaintiffs allege specific actions, such as ransacking the cells of plaintiffs and layoffs in prisoner-staffed jobs, taken by prison officials to deter their lawsuit, a claim has been stated upon which relief may be granted.); Hodges v. Jones, 873 F.Supp. 737 (N.D.N.Y. 1995) (While jailhouse lawyers do not have a constitutional right to that status, they may challenge any official action which impedes them from aiding other prisoners);

Food Service: Williams v. Coughlin, 875 F.Supp. 1004 (W.D.N.Y. 1995) (Where prisoner alleged that he was denied food for two consecutive days, an Eighth Amendment challenge may be mounted.);

Management: Smith v. Norris, 877 F.Supp. 1296 (E.D.Ark. 1995) (Where 92 prison guard positions were needed for adequate supervision of open barracks, an Eighth Amendment violation existed.);

Mail: Muhammad v. Pitcher, 35 F.3d 1081 (6th

> Cir. 1994) (Prison's policy of treating mail to inmate from state Attorney General as ordinary mail and opening it was invalid, as it burdened inmate's First Amendment rights.); and Bieregu v. Reno, 59 F.3d 1445 (3d. Cir. 1995) ("The pattern and practice of opening plaintiff's properly marked incoming mail outside his presence...violates the Constitution.")[3]

The parties themselves found the purpose of the decree so important that they spelled it out in Paragraph 3 of the introduction to the decree: "The provisions contained herein are intended by the parties to assure the constitutionality of the conditions under which prisoners are incarcerated at SPSM-CC."

The significance of this consent decree[4] can not be overstated. The plaintiff class and the defendant, Michigan Department of Corrections, with this court's involvement, labored between 1981 and 1985 to reach an agreement which recognized the existence of constitutional violations in prison conditions and spelled out terms in intricate detail as to how these conditions would be remedied. Under Fed.R.Civ.P. 52(a) such a consent decree or judgment does not require court

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[3] The final areas of the decree cover the presence of volunteer groups, operations, compliance with the decree, and inspection of the facilities under the decree. Supervision over health care and access to the courts was transferred by the U.S. Court of Appeals for the Sixth Circuit to now-Chief judge Richard A. Enslen in the Western District of Michigan in 1992 and 1993, respectively.

[4] With the abolition of the distinction between law and equity, the terms "consent judgment" and "consent decree" are often used synonymously. But the term consent judgment is more comprehensive and includes "decree." In this case consent of the parties and the approval of the court make this more aptly a consent judgment.

findings. U.S. v. Scholnick, 606 F.2d 160 (6th Cir. 1979). The consent judgment's terms provide for the judgment without the necessity of making constitutional findings. Such a judgment has the same res judicata effect as a judgment after trial unless there is a reservation of issues discerned from the four corners of the decree. Epic Metals Corp. v. H.H. Robertson Co., 870 F.2d 1574 (Fed. Cir. 1989), *cert. denied* 493 U.S. 835 (1989).

It would therefore be improper to conclude from this settlement that no constitutional violations exist. The strength of a consent decree is that it allows parties to save the exhausting time, money, and resources involved in making this finding of past violations in order to concentrate on present conditions.[5] By now requiring termination of this judgment unless those constitutional findings are made, the PLRA imperiously transforms a consent decree's strength into a nullity.

If violations no longer exist at SPSM, the consent decree can be terminated according to its own terms. The judgment provides that "[a]fter Defendants have complied with all of the provisions of this Consent Judgment, Defendants may apply to terminate the jurisdiction of the Court." Consent Decree, § XI, 33. Consistent with this possibility, I have

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[5] Congressional support for consent judgments is found in the Civil Rights of Institutionalized Persons Act. It provides that the U.S. Attorney General may institute a civil action against any state or political subdivision thereof "for such *equitable relief* as may be appropriate to insure the minimum corrective measures necessary to insure the full enjoyment of such rights, privileges, or immunities" if the state "is subjecting persons residing in or confined to an institution...to egregious or flagrant conditions which deprive such persons of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States.... 42 U.S.C §1997a (emphasis added). See also 42 U.S.C. 1997b(a)2(B), which supports "informal methods of conference, conciliation, and persuasion...."

repeatedly sought to secure finality. In a March 14, 1995 opinion, I ruled that I would consider defendants' motion for termination of this judgment upon a review of their substantial compliance with the terms of this decree within 60 days of December 31, 1996.

C. Defendants' Rule 60(b) Motion for Modification

In 1994 defendants filed a motion under Fed.R.Civ.P. 60(b) for modification of the consent decree. Based on the testimony of the Director of the Department of Corrections and the Warden of SPSM that they could no longer comply with certain elements of the Out-of-Cell Activity Plan, I held that modification was required and relieved defendants of certain requirements altogether. Specifically, I eliminated the requirement for a capacity of prisoners in the Hadix facilities as well as the requirement for a specific proportion of capacity for levels of segregation. Modification also included adjusting percentage requirements for compliance, substituting comparable groups for involvement in activities, and changing yard assignments. Last, to facilitate finality, I held: "For any provision of the plan involving a numerical measure of compliance, defendants may demonstrate compliance for each Hadix facility separately, or for all Hadix facilities considered in combination."

D. Rufo Standard for Modification

My determination that some modification was appropriate because of significant changes in factual circumstances was mandated by the Supreme Court's decision in Rufo v. Inmates of Suffolk County Jail, 502 U.S. 367, 112 S.Ct. 748, 116 L.Ed.2d 867 (1992). In that case, the Court held that "[m]odification of a consent decree may be warranted

when changed factual conditions make compliance with the decree substantially more onerous." Id., 502 U.S. at 384. Faced with a consent decree which provided for construction of a new jail with single cells and a motion by the prison officials under Rule 60(b) to modify the consent decree to allow double-bunking in the new jail, the Court, in a 6-2 opinion, held that a party seeking modification of a consent decree can do so by showing a significant change in fact or in law. If this standard is met, it is the court's responsibility to ensure that "the proposed modification is suitably tailored to the changed circumstance." Id., 502 U.S. at 383.

The Court illuminated this standard by citing three situations in which lower courts correctly modified a consent decree: 1) "when changed factual conditions make compliance with the decree substantially more onerous"; 2) "when a decree proves to be unworkable because of unforeseen obstacles"; or 3) "when enforcement of the decree without modification would be detrimental to the public interest". Id., 502 U.S. at 384. The Court also refused to limit modification to only those situations in which unforeseen changes occurred. Id., 502 U.S. at 385.

I note with emphasis the Court's mandate that "[a] proposed modification should not strive to rewrite a consent decree so that it conforms to the constitutional floor." Id., 502 U.S. at 391. Instead, once a court finds that modification is required, it should focus solely on whether the proposed modification best suits the change in circumstances. Id., The Court's reasoning is critical to this case: "A court should do no more, for *a consent decree is a final judgment* that may be reopened only to the extent that equity requires" (emphasis added). Id., 502 U.S. at 392.

The Court then added:

> *Within these constraints,* the public interest and considerations based on the allocation of powers within our federal system require that the district court defer to local government administrators, who have the primary responsibility for elucidating, assessing, and solving the problems of institutional reform, to resolve the intricacies of implementing a decree modification.

Id., 502 U.S. at 392 (emphasis added and citations omitted). Thus the Rufo decision represents a determination by the Supreme Court how to weigh the vested rights of inmates seeking enforcement of consent decrees in institutional reform settings against the public's right of local control over their institutions without the unnecessary supervision of the federal judiciary.

Through the PLRA, Congress has in effect declared that that determination does not act swiftly and decisively enough in one specific area of institutional reform. The PLRA completely re-writes the standard for modification in prison litigation, making consent decrees subject to the constitutional floor--in direct contrast to Rufo. As I will discuss more fully below, the PLRA's requirement that a court make new findings for a consent decree, already ordered, represents an unjustifiable encroachment of the legislative and executive branches into the domain of the judiciary. For these reasons, I find §§3626(b) and (c) of the PLRA unconstitutional.

II. THE SUPREME COURT'S TREATMENT OF CONSENT DECREES

The Rufo decision took consent decrees in institutional reform cases out of the confines of the strict standard for modification of consent decrees first enunciated by Justice

Cardozo in United States v. Swift & Co. 286 U.S. 106, 52 S.Ct. 460, 76 L.Ed. 999 (1932). I review the Supreme Court's treatment of consent decrees not only for a clearer understanding of what the law is, but also for a better understanding of the unique, and changing, nature of consent decrees.

A. The Grievous Wrong Test

In Swift the leading meatpackers in the nation were charged by the government of violating the Sherman Anti-Trust Act. These charges were resolved by a consent decree which stipulated that it shall not "be considered as an adjudication that the defendants, or any of them, have in fact violated any law of the United States." Id., 286 U.S. at 111. In exchange, the decree enjoined the meatpackers from participating in a number of transactions that would have the effect of restraining trade and commerce. In 1930, the defendants filed a petition to modify the consent decree, claiming the conditions that justified entering the decree in 1920 had become "useless and oppressive." Id., 286 U.S. at 113.

The Court recognized that even if the consent decree did not retain the power to modify itself by its terms, a court would still possess the power to adapt the decree under the inherent powers of its chancery jurisdiction. Id., 286 U.S. at 114. In making this determination, the Court explicitly rejected the view that a consent decree "is to be treated as a contract and not as a judicial act." Id., 286 U.S. at 115.

Most important in this case is the standard the Court adopted for modifying a consent decree. The Court first limited the scope of the inquiry:

> We are not at liberty to reverse under the guise of readjusting.... The inquiry for us is whether the changes are so important that dangers, once substantial, have become attenuated to a shadow.

Id., 286 U.S. at 119. The Court then stated that the decree should not be changed absent a "clear showing of grievous wrong." Id. This was a burden the defendants could not meet. Over the next six decades, the grievous wrong test proved to be a formidable obstacle to modifying consent decrees in cases where a change in circumstances may have warranted it.

B. The Consent Decree's Statutory Basis

In two such cases, the Supreme Court circumvented the grievous wrong test by emphasizing the statutory basis underlying the consent decree and adhering to that. In System Federation No. 91 v. Wright, 364 U.S. 642, 81 S.Ct. 368, 5 L.Ed.2d 349 (1961), a consent decree was entered into as a result of a pattern of discrimination by the defendant railroad and labor union against non-union employees. At the time, the Railway Labor Act prohibited union shops. The decree, entered in 1945, settled the claims of 28 non-union employees by releasing the railroad and union from all claims of discrimination against them in consideration of a $5,000 payment to each plaintiff and an injunction against further discrimination. Six years later the Railway Labor Act was amended to permit union shops, and the union moved to modify the consent decree under Fed.R.Civ.P. 60(b).

Avoiding the grievous wrong test, the Court ruled that a court's power to adopt a consent decree does not stem from the consideration exchanged between the parties, but from the statute the decree was designed to enforce. Thus the parties in

this case were only incidental to enforcement of the Railway Labor Act, and the court "must be free to continue to further the objectives of that Act when its provisions are amended." Id., 364 U.S. at 651. The Court concluded:

> The parties could not become the conscience of the equity court and decide for it once and for all what was equitable and what was not, because the court was not acting to enforce a promise but to enforce a statute.

Id., 364 U.S. at 652-653. The consent decree was therefore modified, not because a grievous wrong had been shown, but because adherence to the underlying law required it.

This approach was revisited in Firefighters Local Union No. 1784 v. Stotts, 467 U.S. 561, 104 S.Ct. 2576 (1984). There a class action was certified charging that the Memphis, Tennessee Fire Department and certain city officials were engaged in a pattern of discrimination in hiring and promotion decisions on the basis of race in violation of Title VII of the Civil Rights Act of 1964 and 42 U.S.C. §§ 1981 and 1983. A consent decree was entered into in 1980 in which the City denied violating any laws, rules, or regulations, as the plaintiffs charged. The consent decree also made provisions for the hiring and promotion of more blacks in the fire department; it did not contain any provisions regarding layoffs or reductions in rank.

One year after the consent decree was signed, city budget deficits required layoffs of employees, and the most recently hired employees were laid off first--a method which had the effect of vitiating the progress in hiring and promoting blacks made under the consent decree. The district court therefore granted an injunction blocking layoffs that would have a racially discriminatory effect. The U.S. Court of

Appeals for the Sixth Circuit affirmed, phrasing the issue not as one of a preliminary injunction, but as a modification of the consent decree. 679 F.2d 541, 551 (1982).

The Supreme Court, in reversing the lower courts, held that modification of the consent decree in this manner would be in violation of Title VII absent a finding that the seniority system was established with discriminatory intent or a finding that the modification was necessary to make whole a victim of discrimination. Id., 467 U.S. at 561 n.9. In strictly adhering to the law that gave rise to the consent decree, the Court avoided the change in circumstances that may have warranted modification, but clearly did not constitute a grievous wrong.

C. The Contractual Nature of Consent Decrees

In Local Number 93, International Association of Firefighters, AFL-CIO C.L.C. v. City of Cleveland, 478 U.S. 501, 106 S.Ct. 3063, 92 L.Ed. 405 (1986), the Court elaborated on the consent decree's contractual undertakings of the parties' intentions. In that case, a consent decree settling discrimination claims was entered between the City of Cleveland and a group of Hispanic and Black firefighters over the objection of the firefighters' union. The Supreme Court ruled that a district court could issue a consent decree even if it might not have been able to do so after trial under applicable provisions of Title VII of the Civil Rights Act of 1964. In doing so, it discussed the "hybrid nature" of consent decrees and rejected the union's position that a consent decree was an order contemplated by the Civil Rights Act. It stated:

> [C]onsent decrees "have attributes both of contracts and of judicial decrees," a dual character that has resulted in different treatment for different purposes.... The question is not

> whether we can label a consent decree as a "contract" or a "judgment," for we can do both.

Id., 478 U.S. at 519, quoting United States v. ITT Continental Baking Co., 420 U.S. 223, 235-237 and n.10, 95 S.Ct 926, 934 and n.10, 43 L.Ed.2d 148 (1975).

Thus consent decrees evolved from not being contractual in nature in Swift to being recognized as contractual in ITT. A change in circumstances allowed for modification by adherence to the underlying statute in Local 93, but not in Stotts. Throughout this evolution, the Swift grievous wrong test remained intact--and imposing.

In Board of Education of Oklahoma City Public Schools v. Dowell, 498 U.S. 237, 111 S.Ct 630, 112 L.Ed.2d 715 (1991), the Court held that the grievous wrong test did not apply in school desegregation cases. Although this case involved a desegregation decree, and not a consent decree, the Court, in an opinion written by Chief Justice Rehnquist, required only that the school district show that it was acting in compliance with the Fourteenth Amendment and that it was unlikely to return to its policies of segregation. It reasoned:

> Considerations based on the allocation of powers within our federal system, we think, support our view that quoted language from Swift does not provide the proper standard to apply to injunctions entered in school desegregation cases. Such decrees, unlike the one in Swift, are not intended to operate in perpetuity. Local control over the education of children allows citizens to participate in decisionmaking, and allows innovation so that school programs can fit local needs.

Id., 498 U.S. at 248. The lingering question of how to reconcile the pull between the need to give lasting effect to consent decrees and the constitutional requirement to return power over local institutions to the local government was resolved by the Court one year later in Rufo v. Inmates of Suffolk County Jail, supra.

D. Rufo's Resolution of Competing Interests

In Rufo, the Supreme Court explained that consent decrees were not intended to act as a herculean hurdle in the way of local governments trying to maintain control of their institutions. The Court in Swift, noted the Court in Rufo observed the different situations giving rise to a consent decree:

> The distinction is between restraints that give protection to rights fully accrued upon facts so nearly permanent as to be substantially impervious to change, and those that involve the supervision of changing conduct or conditions and are thus provisional and tentative.... The consent is to be read as directed toward events as they then were. It was not an abandonment of the right to exact revision in the future, if revision should become necessary in adaptation to events to be.

Rufo, 502 U.S. at 379-380, quoting Swift, 286 U.S. at 114-115.

The ability of a court to allow room for a decree to meet changing circumstances has assumed a more pressing need through the years. As the Court explained in Rufo:

> The upsurge in institutional reform litigation since Brown v. Board of Education, 347 U.S. 483, 74 S.Ct. 686. 98 L.Ed. 873 (1954), has made the ability of a district court to modify a decree in response to changed circumstances all the more important. Because such decrees often remain in place for extended periods of time, the likelihood of significant changes occurring during the life of the decree is increased.
>
> The experience of the District Courts of Appeals in implementing and modifying such decrees has demonstrated that a flexible approach is often essential to achieving the goals of reform litigation.... The Courts of Appeals have also observed that the public interest is a particularly significant reason for applying a flexible modification standard in institutional reform litigation because such decrees "reach beyond the parties involved directly in the suit and impact on the public's right to the sound and efficient operation of its institutions."

Rufo, 502 U.S. at 380-381 (citations omitted), quoting Heath v. DeCourcy, 888 F.2d 1105, 1109 (6th Cir. 1989).

Accordingly, the Supreme Court has resolved the conflict between the public and private rights involved in public reform litigation. The public's right in maintaining control over its institutions is protected through modification of a consent decree when a change in circumstances so requires. The parties' right to rely on a court order is protected by the limitation precluding a court, or Congress, from stripping a consent decree down to the constitutional floor.

III. REQUIREMENTS AND EFFECT OF THE PLRA

In spite of the clear requirements laid down by the Supreme Court in Rufo for modification of a consent decree as circumstances compel, the role of the federal judiciary in prison litigation cases was sought to be completely revised through the PLRA. To what extent a court's jurisdiction has been changed by the PLRA is a source of contention between the defendants and the intervenor United States.

A. The Different Interpretations of Defendants and Intervenor

Defendants contend that §3626(b)(3) of the PLRA does not even apply in the present situation. According to defendants, when a decree has been entered without the findings required by §3626(b)(2), the court's inquiry need go no further; termination is required at that point.[6]

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[6] Their interpretation is consistent with the legislative intent as expressed by one of the Act's co-sponsors, in presenting the Bill to the Senate:

> The legislation I am introducing today will return sanity and State control to our prison systems. It will do so by limiting judicial remedies in prison cases and by limiting frivolous prisoner litigation.
>
> First, we must curtail interference by the Federal courts themselves in the orderly administration of our prisons. This is not to say that we will have no court relief available for prisoner suits, only that we will try to retain it for cases where it is needed while curtailing its destructive use.
>
> ...

Intervenor states in its brief that this interpretation raises "a serious constitutional question." To avoid the constitutional issues, intervenor argues that the finding of a current or ongoing violation a Federal right under the PLRA "encompasses not only unlawful conduct that is actually in progress at the very moment the court rules, but also failure to remedy the proximate effects of past unlawful acts." (Intervenor's Brief at 16.) It contends that a consent decree can continue if a constitutional violation has not been fully remedied or that the defendant is poised to resume the unconstitutional conduct. Thus intervenor's position is that the PLRA does not require new findings to be made regarding settled orders as much as it requires a court to tailor the decree to satisfy the PLRA standards.

The problem with intervenor's position is that some finding of past unlawful acts is still required--a finding that consent decrees were designed to avoid:

> Consent decrees are entered into by parties to a case after careful negotiation has produced agreement on their precise terms. The parties

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> No longer will prison administration be turned over to Federal judges for the slightest reason. Instead, the States will be able to run prisons as they see fit unless there is a constitutional violation, in which case a narrowly tailored order to correct the violation my be entered.
>
> ...
>
> No longer, then, will we have consent decrees, such as those in Michigan under judges control the prisons literally for decades.

141 Cong. Rec. S.14316-17 (daily ed. Sept. 26, 1995) (statement of Sen. Abraham).

> waive their right to litigate the issues involved in the case and thus save themselves the time, expense, and inevitable risk of litigation. Naturally, the agreement reached normally embodies a compromise; in exchange for the saving of cost and elimination of risk, the parties each give up something they might have won had they proceeded with the litigation. Thus the decree itself cannot be said to have a purpose; rather the parties have purposes, generally opposed to each other, and the resultant decree embodies as much of those opposing purposes as the respective parties have the bargaining power and skill to achieve.

United States v. Armour & Co., 402 U.S. 673, 681-82, 91 S.Ct. 1752, 29 L.Ed.2d 256 (1971). Even under intervenor's less stringent reading of the Act, I am still required to open a final judgment to make findings that both parties agreed was in their best interest to circumvent. This fact is not changed by intervenor's position that "the record may include supplemental information that is presented to the court" when additional evidence is necessary (Intervenor's Brief at 14 n. 5), for I would still need to make findings of unlawful conduct. The "careful negotiation" that has gone into this decree; the parties strategy to save "time, expense, and inevitable risk of litigation"; the compromises made in exchange for giving up a risk; and the resulting decree embodying each party's bargaining power are all made futile by a requirement to make these findings. Thus the PLRA cuts a swath through the judicial process. Under the analysis of either intervenors or defendants, I am still required by the PLRA to reopen this judgment to make findings that are antithetical to it.

B. The Effect of Prospective Relief

This fact is not changed by the Act's references to "prospective relief." The Act defines prospective relief as "all relief other than compensatory monetary damages." 18 U.S.C. §3626(g)(7). The enabling provision stipulates that §3626 "shall apply with respect to all prospective relief whether such relief was originally granted or approved before, on, or after the date of the enactment of this title." Prison Litigation Reform Act, Pub.L.No. 104-134, 1996 U.S.C.C.A.N. (§802(b)(1)) 178.

The Act's use of the term "prospective relief" masks the real issue. Injunctive relief affects conditions as they arise. Past injunctive relief cannot be changed as time cannot be turned back. The issue then is this: can injunctive relief based on past negotiations, cost assessments, and compromises between parties be overturned by an act of Congress?

I conclude that it is not prospective relief that is being altered, but the consent judgment itself. A court possesses the power to modify a consent decree to fit a substantial change in fact or in law. Rufo, supra. Extending modification of a decree by a court to the virtual termination of an entire group of decrees by Congress exceeds the limits of congressional authority.

There is no question but that Congress possesses the right to determine the jurisdiction of the lower courts. U.S.Const. Art. III, §1. Whether it can preclude district courts from ever exercising jurisdiction in a particular area, such as prison litigation, is a highly debated topic (see, for example, Henry M. Hart, Jr.. Dialogue, 66 Harvard Law Review 1362 (1953)), but that is not the issue here. Through the PLRA, Congress is attempting to rescind a consent decree entered in this court eleven years ago. This, Congress cannot do.

IV. THE PLRA'S VIOLATION OF THE SEPARATION OF POWERS DOCTRINE

A. Plaut's Application to the Case

Sections 3626(b)(2) and (3) represent an unconstitutional intrusion by Congress into the domain of the judiciary. "A legislature without exceeding its province cannot reverse a determination once made, in a particular case; though it may prescribe a new rule for future cases." Plaut v. Spendthrift Farm, Inc., ---U.S.---, 115 S.Ct. 1447, 1455 (1995), quoting The Federalist No. 81, p. 545 (J. Cooke ed. 1961). Ruling on a similar action by Congress last year, the Supreme Court concluded that "[b]y retroactively commanding the federal courts to reopen final judgments, Congress has violated [the] fundamental principle" that Congress cannot reverse a court's decision. Plaut, 115 S.Ct. at 1453.

The Supreme Court in Plaut was confronted with legislation which circumscribed the Court's previous decision in Lampf, Pleca, Lipking, Prupis & Pettigrew v. Gilbertson, 501 U.S. 350, 364, 111 S.Ct. 2773, 2782, 115 L.Ed.2d 321 (1991). In that case, the Court held that particular types of securities suits were subject to a three-year statute of limitation after the violation and a one-year statute of limitation after discovery of the violation. Subsequent to the Supreme Court's decision, Congress amended the statute in question to allow suits that would not have been time-barred before the decision in Lampf. The law, then, opened for adjudication suits which were effectively closed by the decision in Lampf. The Supreme Court held Congress' action unconstitutional, stating:

> Having achieved finality, however, a judicial decision becomes the last word of the judicial department with regard to a particular case of controversy, and Congress may not declare by

> retroactive legislation that the law applicable *to that very case* was something other than what the courts said it was.

Plaut, 115 S.Ct. at 1457. Similarly, the PLRA applies law to the consent decree at issue here that was clearly not the law when it was entered into.

The Plaut decision issued a clarion call that the separation of powers doctrine must be strictly adhered to: The doctrine "is a prophylactic device, establishing high walls and clear distinctions because low walls and vague distinctions will not be judicially defensible in the heat of interbranch conflict." Id., 115 S.Ct. at 1447.

Despite this strong language, the Court twice intimated that its decision may not apply to prospective relief, thereby raising a question whether the rationale of Plaut extends to consent decrees such as the one at issue here. First, in response to the dissent's assertion that statutes do exist that retroactively open final judgments as an "ordinary product of the exercise of legislative power," the Court defended its interpretation of the statute cited by dissent as "consistent with the only case the dissent cites, which involved a court-ordered consent decree not yet fully executed. Counsel v. Dow, 849 F.2d 731, 734, 738-739 (2d Cir. 1988)." Id., 115 S.Ct at 1461. This language could be construed as authorizing legislative action over consent decrees whose injunctive effect is ongoing.

However, the scope of §§3626(b)(2) and (3) extends too far to fit into the narrow exception that could be inferred from Plaut. The Court in Plaut noted that the statutes involved in Dow did not necessitate adjudication of previously settled claims. Dow involved a curative statute which allowed for the award of attorney fees in suits for handicapped children after

the Court held in Smith v. Robinson, 468 U.S. 992 (1984), that such fees were not available from the underlying statute. The Court in Plaut observed that the amendment allowing fees "says nothing about reopening final judgments, and the retroactivity provision may well mean nothing more than that it applied not merely to new suits commenced after the date of its enactment, but also to *previously* filed (but not yet terminated) suits", of which Dow is an example. Plaut, 115 S.Ct. at 1461.

The second point in Plaut which raised a question regarding its application to consent decrees was the Court's declaration that "Congress could undoubtedly enact *prospective* legislation permitting, or indeed requiring, this Court to make equitable exceptions to an otherwise applicable rule of finality, just as district courts do pursuant to Rule 60(b)." Id., 115 S.Ct. at 1462. The provisions of the PLRA at issue here are indisputably retroactive in application. I therefore find that the rationale of Plaut applies to the separation of powers issues raised by §3626(b)(2) and (3) of the PLRA.

B. The Meaning of Finality

By distinguishing different types of finality, defendants and intervenors hope to break the link between Plaut's holding that final judgments cannot be reopened by Congress and Rufo's holding that a consent decree is a final judgment. According to this argument, the jurisprudence developed regarding consent decrees, as epitomized in Rufo, involves a court's inherent power, which can be overridden by Congress, as opposed to its constitutional power, which cannot, as shown in Plaut. The accuracy of this distinction is vital to resolving the clash between Rufo's mandate that a consent decree not be pared down to the constitutional floor and the PLRA's requirement that it be so.

In Carlisle v. United States,--- U.S. ---, 116 S.Ct. 1460, 134 L.Ed.2d 613, 64 U.S.L.W. 4293 (1996), the Court refused to allow a district judge, under the inherent powers of the court, to grant a motion filed one day late under the Federal Rule of Criminal Procedure 29(c). Similarly, the Court ruled in Degen v. United States,--- U.S. ---, 116 S.Ct. 1771, 135 L.Ed.2d 102, 64 U.S.L.W. 4413 (1996), that a district court could not use its inherent powers to apply to a doctrine that had been developed and applied in criminal cases to a civil forfeiture case. Both these cases, then, involve the question of a district court judge's power to act without the authorization of a statute or the Supreme Court. In these situations, the Supreme Court has clearly limited a district court's exercise of its inherent power.

Just as clearly, that is not the situation here. I apply the law here regarding the power of a district court to modify its orders as it has been developed over the course of two centuries and crystallized in Rufo. My decision is not grounded on inherent authority but on constitutional authority. Marbury v. Madison, 1 Cranch 137, 2 L.Ed. 60 (U.S. 1803).

Nor can it be said that the law regarding the modification of consent decrees, as developed by the Supreme Court, merely expresses a court's inherent power and is therefore subject to congressional override. Nothing could be more important to the exercise of a court's Article III power than the power to enforce a decision. To the extent that this power can be characterized as inherent, it is indispensably inherent. "Certain implied powers must necessarily result to our courts of justice, from the nature of their institution.... To fine for contempt, imprison for contumacy, *enforce the observance of order, &c., are powers which cannot be dispensed with in a court, because they are necessary to the exercise of all others....*" United States v. Hudson, 7 Cranch 11 U.S. 32, 34 (1812) (emphasis added). In abrogating a

court's power to enforce one of its orders, Congress has invaded one of the most vital constitutional powers of the judiciary.

C. Principles Behind The Separation of Powers Doctrine

Consent decrees have been used by government agencies and private entities as the most expeditious route to resolution on a variety of issues, including the improvement of special education programs, the desegregation of schools systems, the cleanup of toxic wastes, the reformulation of exclusionary zoning lines, and the betterment of mental health institutions. Vitiating the finality of consent decrees in the area of prison reform makes the consent decrees in all other areas equally subject to congressional judgment, thus chilling a party's incentive to enter into one. Reform in these areas would consequently be impeded.

This danger was contemplated by the Framers of the Constitution in warning that the accumulation of power in any one branch "may justly be pronounced the very definition of tyranny." The Federalist No. 47, 301 (C. Rossiter ed. 1961).

> Not favoritism, nor even corruption, but *power* is the object of the separation-of-powers prohibition. The prohibition is violated when an individual final judgment is legislatively rescinded for even the *very best* of reasons, such as the legislator's genuine conviction (supported by all the law professors in the land) that the judgment was wrong; and it is violated 40 times over when 40 final judgments are legislatively dissolved.

Plaut, 115 S.Ct. at 1457.

As Justice Scalia explained in Plaut, the Framers were attempting to prohibit exactly this form of government when it established separation of powers safeguards.

> Before and during the debates on ratification, Madison, Jefferson, and Hamilton each wrote of the factional disorders and disarray that the system of legislative equity had produced in the years before the framing; and each thought that the separation of the legislative from the judicial power in the new Constitution would cure them.

Plaut, 115 S.Ct. at 1454. Justice Scalia reiterated James Madison's "famous description of the process by which '[t]he legislative department is every where extending the sphere of its activity, and drawing all power into its impetuous vortex." Id. quoting The Federalist No. 48, 333 (J. Cooke ed. 1961).

> Similarly, Justice Brandeis pronounced seventy years ago:
>
> The doctrine of the separation of powers was adopted by the Convention of 1787 not to promote efficiency but to preclude the exercise of arbitrary power. The purpose was not to avoid friction, but, by means of the inevitable friction incident to the distribution of the governmental powers among three departments, to save people from autocracy.

Myers v. United States, 272 U.S. 52, 293, 47 S.Ct. 21. 71 L.Ed.2d 160 (1926) (Brandeis, J., dissenting).

I note the approach taken by Justice Breyer in his concurring opinion in Plaut that a separation of powers inquiry should focus on the principle of protecting individual liberty.

Plaut, 115 S.Ct. at 1447.[7] A review of the effects of §§3626(b)(2) and (3) demonstrates that individual liberty is being curtailed by its requirements. Plaintiffs originally brought this action challenging the constitutionality of their conditions of confinement. In the course of negotiation with defendants, they traded a potential finding of unconstitutionality for defendants' commitment to assure the constitutionality of their confinement. The consent decree embodying this exchange received the imprimatur of this court, and "[a] legislature without exceeding its province cannot reverse a determination once made, in a particular case; though it may prescribe a new rule for future cases." Plaut at 1455, quoting The Federalist No. 81, 545 (J. Cooke ed. 1961). "It is emphatically the province and duty of the judicial department to say what the law is." Marbury v. Madison, 1 Cranch 137, 2 L.Ed. 60 (U.S. 1803).

Instead of working to fulfill their compliance requirements, defendants now move to terminate the decree altogether. Such a result would unjustifiably deny plaintiffs the relief to which they are entitled by the power of this court--a power that cannot be taken away by Congress. Sections 3626(b) and (c) are therefore unconstitutional, and a determination of the required findings is unnecessary.

V. DEFENDANTS' MOTION FOR TERMINATION UNDER RULE 60

Two routes remain available for termination of this judgment. Defendants' may move for termination upon achieving compliance with the consent decree pursuant to its terms, or termination may be required upon a substantial

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[7] See also, Note, Congressional Authority to Reopen Final Judgments, Harvard Law Review, November, 1995.

change in fact or in law. Under either of these approaches, completion of the S-2 Alternative Plan is key.

Built in 1926, Jackson "is still considered to be the largest walled prison in the world with over 57 1/2 acres inside the Central Complex." Michigan Manual at 452 (The Legislative Service Bureau 1995-96). Integral to the consent decree is the plan in §VIII which provides for the break-up of the prison into four autonomous units instead of one large prison.

Pursuant to §VII of the consent decree, defendants conducted a study of the organization, staffing, and administration at SPSM, provided it to plaintiffs to be returned with input, and sculpted that information into a management plan for SPSM. The management plan originally submitted eventually proved to be unsatisfactory to both defendants and plaintiffs, and I refused to approve it. Following negotiation, the plan was redeveloped and the parties stipulated to the establishment of the SPSM Decentralization Team (SDT) which consisted of three representatives of the defendants and one representative of the plaintiffs.

The SDT was given broad authority to approve changes during the further development and implementation of the plan with the reservation that, should the SDT members not achieve consensus as to such a decision, then the court monitor, counsel for both parties, and I would get involved.

Following a hearing in October 1992, I approved what has been termed the "S-2 Alternate Plan." This plan was proposed by defendants, and adopted by the court, after the SDT was unable to agree on certain aspects of the plan before them. At the hearing, defendants stated on the record and in their written submissions that the S-2 Alternate Plan was deemed acceptable by the Department of Corrections and other

State officials. (Defendants' Memorandum In Support Of Motion To Set For Hearing, October 13, 1992, at 2.) The project was subsequently funded with the approval of the State Legislature and the Office of Management and Budget.

On September 20, 1996, as has been my practice in the past, I personally inspected, and was impressed by, the progress of the break-up plan's construction. Phase I of the plan is nearly complete; Phases II and III have been stayed by the United States Court of Appeals for the Sixth Circuit pending appeal of my July 5, 1996 order holding unconstitutional the automatic 30-day stay provision of the PLRA. I remain convinced that completion of the S-2 Alternate Plan is necessary for termination of this consent judgment for two reasons.

First, the S-2 Alternate Plan that defines defendants' obligations was developed by the defendants and submitted to the court as an alternative to other plans under consideration by the SDT and plaintiffs. Plans generated by defendants are inferentially the least intrusive alternative as well as being least likely to contain unworkable elements. Furthermore, the plan provides that the SDT function by consensus. Since no dispute within the SDT has been raised before this court since approval of the S-2 Alternate Plan, I conclude from the record that defendants have not had objections to the way that implementation has proceeded.

Second, the S-2 Alternate Plan was formulated to correct structural deficiencies in venting, plumbing, hygienic and heating conditions that may rise to the level of constitutional violations as they currently exist. The new units are also being re-built to ensure protection of the prisoners from harm and to provide adequate space for prisoners' out-of-cell activities. The continuation of the S-2 Alternative Plan is therefore most vital to actualizing the purpose of the

consent decree. When the final phases are completed, termination of this decree should be warranted both by the decree's provision for termination upon achievement of compliance with its terms and also under Rufo's requirement for a substantial change in fact or in law.

VI. CONCLUSION

Because it violates separation of powers principles, I hold §§3626(b)(2) and (3) of the Prison Litigation Reform Act unconstitutional, and therefore deny defendants' motion for termination pursuant to it. Defendants' motion for termination under Rule 60(b), on remand before me to be reconsidered in light of the PLRA, is consequently denied as well.

IT IS SO ORDERED.

JOHN FEIKENS
UNITED STATES DISTRICT JUDGE

Dated: Nov. -1, 1996